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September 23, 2013					
FEDERAL MARITIME COMMISSION					

**FEDERAL MARITIME COMMISSION**

**DOCKET NO. 09-08**

**SSA TERMINALS, LLC and  
SSA TERMINALS (OAKLAND), LLC**

**v.**

**THE CITY OF OAKLAND, ACTING BY AND THROUGH  
ITS BOARD OF PORT COMMISSIONERS**

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**INITIAL DECISION APPROVING SETTLEMENT<sup>1</sup>**

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On September 3, 2013, the Commission issued an Order to Supplement the Record instructing the parties to file a copy of their settlement agreement, if any, with the Administrative Law Judge and instructing that an Initial Decision be issued on or before October 10, 2013. Order to Supplement the Record at 2. On September 10, 2013, the parties filed a Joint Response to Commission's Order to Supplement the Record ("Joint Response"). The Joint Response, the Settlement Agreement, and supporting documents have been reviewed and for the reasons set forth below, the settlement is approved.

**I. BACKGROUND**

Complainants SSA Terminals, LLC, and SSA Terminals (Oakland) LLC ("SSAT") commenced this proceeding by filing a complaint on December 16, 2009, alleging that Respondent City of Oakland, acting by and through its Board of Port Commissioners ("Port") had violated Sections 10(d)(1), 10(d)(3), and 10(d)(4) of the Shipping Act of 1984, 46 U.S.C. §§ 41102(c), 41106(3), 41106(2). SSAT filed an amended complaint on June 7, 2012. SSAT alleged that the Port, by entering into a Concession and Lease Agreement for Berths 20-24 (sometimes referred to as the "Concession") with Ports America Outer Harbor Terminal, LLC ("PAOHT"), violated the

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<sup>1</sup> The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

foregoing provisions of the Shipping Act by granting and continuing to grant PAOHT unduly and unreasonably more favorable terms for the rental and use of marine terminal facilities at the Port of Oakland than those provided to SSAT.

The Port answered the complaint and asserted a variety of defenses, including but not limited to Eleventh Amendment sovereign immunity. The Port claimed that it was an arm of the State of California for purposes of the Eleventh Amendment of the United States Constitution, and thus the Commission did not have jurisdiction over private party claims. That issue was fully briefed and, in a November 8, 2010, Order, the Port's motion to dismiss on sovereign immunity grounds was denied. Order on Motion to Dismiss and Motion to Stay Proceedings at 13. The Port appealed the decision and, by Order of December 13, 2011, the Commission affirmed the decision that the Port is not entitled to Eleventh Amendment sovereign immunity.

The Port filed a Petition for Review of the Commission's decision with the U.S. Court of Appeals for the District of Columbia Circuit on February 9, 2012. The D.C. Circuit heard oral argument on April 9, 2013. On July 26, 2013, the D.C. Circuit upheld the Commission's decision that the Port was not entitled to sovereign immunity. *City of Oakland v. Federal Maritime Commission*, 724 F.3d 224 (D.C. Cir. 2013).

While this proceeding was pending, a related proceeding was filed. According to the parties:

On February 25, 2011, the Port filed a Declaratory Relief action in the Alameda Superior Court against SSAT. The Declaratory Relief action was filed after SSAT filed a California Government Code Section 910 claim with the Port alleging that it violated the 1911 Tidelands Trust Act when it awarded the Concession to PAOHT. Specifically, SSAT claimed that the Concession gave PAOHT an unfair, disparate competitive advantage in soliciting carriers to Berths 20-26 at the Port who were, are, or may use SSAT's terminals at Berths 57-59, and that this was unlawful discrimination in violation of the 1911 Tidelands Trust Act. SSAT estimated its losses to be up to \$157 million through 2017, which is the year when the initial terms of its lease with the Port expires, and up to \$300 million if SSAT elected to extend its lease to 2027.

SSAT removed the Port's state court action to Federal District Court and filed a Counterclaim against the Port alleging three causes of action: Breach of Implied Covenant of Good Faith and Fair Dealing under SSAT's lease with the Port; Discriminatory Acts in Violation of the Tidelands Tr[u]st Act; and Wrongful Breach of Joint Venture Agreement. SSAT claimed damages that it made in its Government Code claim. The Port filed a motion for summary judgment as to each of the three causes of action alleged in the Counterclaim. The Court granted summary judgment on two of the causes of action in favor of the Port, but denied the Port's motion with regard to SSAT's cause of action for the Discriminatory Acts in Violation of the Tidelands Trust Act.

Although the legal issues and governing laws in this proceeding and the proceeding before the U.S. District Court are distinct, the parties agreed the discovery of factual issues in both proceedings would likely be the same. Therefore, the parties agreed to consolidate discovery in these two proceedings to the extent possible, including depositions of expert and fact witnesses, interrogatories, and production of documents. Discovery was completed at the end of February 2013, and all pretrial documents were filed with the U.S. District Court at the end of April 2013. Monthly status reports were filed with the Presiding Officer.

The parties began initial settlement discussions in this case in 2009, even before the current action was filed. Those discussions terminated in July 2010. Renewed settlement discussions began in September last year. After the parties filed all pre-trial documents in the U.S. District Court case at the end of April, a Pre-Trial Conference was held on May 10, 2013. During that Pre-Trial Conference, the parties discussed their settlement negotiations with Judge Gonzale[z] Rogers, and noted that the parties had reached tentative agreement on a number of substantive terms, but that some terms remained outstanding. Judge Gonzalez Rogers strongly encouraged the parties to continue their negotiations. The parties had a telephone conference with Judge Gonzalez Rogers on May 29, 2013 to report on the status of their settlement discussions. While the parties continued to make progress on settlement discussions, several items still remained unresolved.

The parties had a follow-up telephone conference with Judge Gonzalez Rogers on June 14, 2013. Following that call, Judge Gonzalez Rogers issued an Order referring the case to U.S. Magistrate Judge Joseph C. Spero for a mandatory settlement conference, which was held on June 18, 2013. Counsel for both parties, along with principal representatives of SSAT and the Port, were all present at the mandatory settlement conference. With the facilitation and mediation by Magistrate Judge Spero, the parties reached a settlement agreement in principle, subject to drafting formal settlement documentation and execution by the parties. The material terms of the parties' agreement included the dismissal of both the U.S. District Court proceeding and the instant proceeding, and also dealt with a wide variety of other commercial matters, such as the restructuring of the SSAT lease and leases for the adjacent terminals at the Port.

On July 31, 2013, the parties filed a Stipulation and Proposed Order of Dismissal with Prejudice of the District Court proceeding, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure. Judge Gonzalez Rogers issued an Order on August 1, 2013 granting the Stipulation and dismissing the case with prejudice.

Joint Response at 4-7 (footnote omitted).

On July 31, 2013, SSAT and the Port filed a Notice of Voluntary Dismissal with prejudice of this case pursuant to new Rule 72 of the Commission's Rules of Practice and Procedure. *See* 46

C.F.R. 502.72(a)(1). On August 20, 2013, the Secretary issued a Notice of Voluntary Dismissal stating that “the above-captioned proceeding is dismissed with prejudice and discontinued.” Notice of Voluntary Dismissal at 1. On the same day, the Secretary issued a Notice of Commission Determination to Review, pursuant to Commission Rule 227, 46 C.F.R. 502.227, which stated the Commission had determined to “review the Notice of Voluntary Dismissal issued and served by the Secretary.” Notice of Commission Determination to Review at 1. On September 3, 2013, the Commission issued an Order to Supplement the Record.

According to the parties, the settlement was submitted to the Port’s Board of Commissioners for consideration at a meeting held on June 27, 2013. The Board chose to defer consideration of the settlement at that meeting since all documents has not been fully executed. The Port’s Board had a meeting on July 11, 2013, where the final settlement agreement and lease agreements were approved by all of the Commissioners attending and a first reading of certain of the documents took place. A second reading of the ordinance before a special Board meeting took place on July 18, 2013, where the Board formally approved of all of the necessary agreements and finalized the settlement. Joint Response at 9.

The parties describe the settlement as follows:

The terms of the settlement agreement are somewhat different from typical commercial settlements in that they do not provide for SSAT to receive a cash payment in return for its agreement to dismiss the pending legal actions against the Port. Rather, the Settlement Agreement reflects the efforts of the parties to structure a comprehensive resolution of the underlying issues in this case, which SSAT and Port staff strongly believe, notwithstanding their differing views regarding the legal merits of the claims and defenses in this and the U.S. District Court proceeding, are beneficial to both parties and the shipping industry at large.

The following is a summary of the key terms of the parties’ Settlement Agreement. A map of the Port is attached as Appendix B.

1. **Dismissal of Lawsuits.** In consideration of all the terms and conditions of the settlement agreement, the parties would dismiss the U.S. District Court and seek dismissal of this proceeding, with each party to bear its own costs and attorneys’ fees.
2. **Berths 55-56.** Berths 55-56 at the Port are currently under a Non-Exclusive Preferential Assignment Agreement (“NEPAA”) dated October 9, 2000, as amended (collectively, the “B55-56 Lease”) between the Port and Total Terminals International, LLC. While independent of the settlement agreement, SSAT will assume the B55-56 Lease for the remainder of its initial term, which expires on June 8, 2016. SSAT has the right to extend the B55-56 Lease to no later than June 30, 2022, and must give the Port twelve (12) months’ notice of whether it will exercise this option.

3. **Berths 60-63.** Berths 60-63 at the Port are currently under a Non-Exclusive Preferential Assignment Agreement dated August 30, 2005, as amended (collectively, the “B60-63 Lease”) between the Port and Eagle Marine Services, Ltd. The existing B60-63 Lease will be terminated, effective July 15, 2013. SSAT will enter a new lease to operate the B60-63 Terminal, effective October 1, 2013. The term for the new B60-63 Lease will expire on June 30, 2022, and SSAT has no option to extend that lease.
4. **Berths 57-59.** Berths 57-59 at the Port are currently under the Berths 57-59 Amended and Restated Non-Exclusive Preferential Assignment Agreement dated October 1, 2008 (the “B57-59 Lease”) between the Port and SSAT. The initial term of the B57-59 Lease is set to expire on October 18, 2017, with SSAT’s holding two options to extend the initial term by an additional five (5) years each. The B57-59 Lease will be amended to extend the expiration of the initial term to June 30, 2022, and SSAT will have no options to extend that lease. In connection with the extension of the B57-59 Lease, the parties reached an agreement regarding the purchase and raising of cranes in the future in order to accommodate larger ships calling at Berths 57-59, as well as some other commercial terms relating to the B57-59 Lease.
5. **Berths 67-68.** Berths 67-68 at the Port are currently under an Amended and Restated Non-Exclusive Preferential Assignment Agreement (Howard Terminal) dated October 1, 2008 (the “Howard Terminal Lease”) between the Port and SSAT. The Port agrees to terminate the Howard Terminal Lease effective October 1, 2013, with SSAT agreeing to pay rent to the Port for the Howard Terminal through September 30, 2013.
6. **Port’s Marketing Rights.** The Port shall have the right to market all or any portion of Berths 55-56, Berths 57-59, and Berths 60-63 at any time for lease to any other third party that the Port in its sole discretion determines is a potential tenant, and SSAT shall not interfere or object to the Port’s exercise of such rights.

Joint Response at 7-8.

## **II. Arguments of the Parties**

The parties assert that the Settlement Agreement meets Commission standards and should be approved, stating:

The Settlement Agreement between SSAT and the Port should be promptly approved. The Settlement Agreement is fair, adequate, and reasonable for both SSAT and the Port, is not the product of collusion or coercion, and does not violate the Shipping Act or public policy. Each party was represented by two law firms.

SSAT alleged that the Port, by entering into a Concession and Lease Agreement for Berths 20-24 at the Port with Ports America Outer Harbor Terminal, LLC ("PAOHT"), violated provisions of the Shipping Act by granting and continuing to grant PAOHT unduly and unreasonably more favorable terms for the rental and use of marine terminal facilities at the Port of Oakland than those provided to SSAT. SSAT claims that it pays a significantly higher rent for its marine terminal at berths 57-59 in the Port pursuant to its 2000 agreement than PAOHT. SSAT contends that the difference in rates paid by PAOHT and SSAT under their respective leases is approximately \$100,000 per acre. SSAT further contends that PAOHT's more favorable lease terms enable PAOHT to solicit SSAT's customers with lower rates, and that SSAT has lost and will continue to lose business and revenue as a result of the Port's Concession with PAOHT. SSAT contends that the condition of the PAOHT terminal and the SSAT terminal does not justify the discrepancy in rents of those terminals. SSAT also contends that PAOHT has been able to attract customers without any significant capital improvements and that PAOHT is not required under its lease to make any improvements. SSAT estimates its losses to be to \$157 million through 2017, which is the year when the initial term of its lease with the Port expires, and up to \$300 million if SSAT elected to extend its lease to 2027. The Port denies these contentions.

The Port raised a number of defenses to SSAT's complaint. The Port contends that SSAT is not entitled to any monetary recovery because the Concession with PAOHT provides reasonably similar value as its agreement with SSAT. The Port further contends that even if the SSAT and PAOHT agreements contain different rents, such difference is reasonably justified under the circumstances, because the PAOHT Concession was entered into during the "Great Recession," PAOHT paid a \$60 million upfront fee and SSAT paid no fee for its lease at berths 57-59, PAOHT's facility is in poorer condition than the SSAT facility and PAOHT took its terminal "as is," PAOHT is responsible for nearly all of its own maintenance, construction, and repair costs, and PAOHT's commitment is for 50 years. SSAT denies these contentions.

While the outcome of this dispute was not certain, it is clear that the Settlement Agreement relieves the Port of the potential for liability on a very substantial claim without having to make any monetary payment to SSAT. The Settlement Agreement also relieves both parties and the Commission of the need for expending further resources in litigating a complex dispute.

The Settlement Agreement is also a reasonable step to take at this juncture. The parties have already expended significant time and resources in discovery and motion practice in both this proceeding and the related District Court proceeding. The parties exchanged thousands of documents in discovery. In all, 25 fact witness depositions were taken in New York, New Jersey, California, and Washington, D.C.

Nine expert witness depositions were taken in California and Washington, D.C. SSAT served two expert witness reports on the Port, and the Port served a rebuttal report. SSAT served an initial and supplementary response to the Port's rebuttal report.

Nevertheless, if the litigation were to continue, enormous sums would need to be expended in connection with further pleadings and hearings, and the litigation would continue to subject both parties to other substantial burdens and disruption. The Settlement Agreement eliminates the need for all such further litigation before the Commission on the issues to be settled, at great savings of both the parties' and, for purposes of this proceeding, the Commission's resources.

SSAT and the Port's decision to forgo substantial and complex, if uncertain, litigation in exchange for resolving any potential liability is thus obviously fair, adequate, and reasonable. The parties' decisions to settle were made independently, based upon careful consideration of its merits and the potential litigation costs with counsel, and were not the product of any collusion or coercion. As noted, this settlement was reached only after lengthy negotiations over a period of months, careful consideration by both parties, and the assistance of Magistrate Judge Spero. "Generally, when examining settlements, the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their positions weighed against the risks and costs of continued litigation." *Delhi Petroleum*, 24 S.R.R. at 1134. The Presiding Officer in *Delhi Petroleum* went on to note that "if it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Id.* Likewise, there is simply no evidence to demonstrate that the Settlement Agreement was reached as a result of fraud, duress, or mistake. See *Monarch Shipping Lines, Inc., et al.*, 30 S.R.R. 820 (FMC, 2005) (approving settlement where agreement was fair, reasonable and adequate and where there was no evidence of fraud, duress, or mistake).

In addition to being fair, adequate, and reasonable, the parties Settlement Agreement is in the interests of public policy, as it will benefit SSAT, the Port, and the shipping public. For SSAT, the settlement will achieve certain cost savings and make SSAT a more efficient and competitive marine terminal operator at the Port of Oakland. SSAT's carrier customers, the Port, and the shipping public will benefit from these efficiencies.

The numerous benefits of the Settlement Agreement to the Port are summarized by the Port's staff in item 6.3 of the Agenda Report for the July 11, 2013, meeting. As stated by the Port staff, "the transactions proposed for approval effectuate the dismissal of the Lawsuits, but also achieve important business and

financial objectives that provide the Port, its tenants, customers, community and stakeholders with competitive benefits and future opportunities greater than those anticipated in the absence of the requested actions.” [Joint Response ]Exhibit C, Agenda Report at 104. Specifically, the Port’s staff identified three key benefits of the Settlement to the Port and its stakeholders. First, for Berths 57-59 and 60-63, the Settlement provides the Port with lease revenue for an additional five years (through 2022), which provides the Port with revenue stability of mitigation of risk associated with unfavorable lease extension options in the current leases. Second, the Settlement immediately creates a contiguous 350-acre terminal facility under one operation, and allows the Port to market this consolidated 350-acre terminal in the near future. Third, it provides the Port’s major ocean carrier customers enhanced facilities that can accommodate the newest generation of ultra-large container vessels. *Id.* at 104-105.

As noted in the Agenda Report, the Port’s staff has for some time analyzed the future needs of terminal operators at the Port, most notably the trend toward larger terminals that can service multiple vessels. “As larger vessels rapidly replace smaller vessels, port and terminal operations will be greatly impacted and will require longer berth length and larger terminal area.” The limited berth length and scale of operations at the three separate terminals in the Port “will become a significant concern for [the Port’s] ocean carrier customers and terminal operators.” To address this concern, Berths 55-56, 57-59, and 60-63 together provide the Port with an opportunity to create a consolidated terminal because of their contiguous land facilities. But the current lease agreements (including option language in the leases) prevent achievement of this consolidated terminal in the near-term. As part of the Settlement Agreement, these leases would be restructured in order for the Port to achieve this important objective. Thus, the Settlement Agreement improves the overall competitive position of the Port by increasing its ability to efficiently handle the increasing number of larger vessels, and allows the Port to competitively market the consolidated 350-acre terminal and other terminal operators the opportunity to propose operations for this facility in the near-term. For all of these reasons, the Settlement Agreement is beneficial to both parties and the shipping industry at large, and therefore consistent with public policy.

Joint Response at 12-17.

### **III. DISCUSSION**

Using language borrowed in part from the Administrative Procedure Act, Rule 91 of the Commission’s Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement “where time, the nature of the proceeding, and the public interest permit.” 46 C.F.R. § 502.91(b).



The Commission has a strong and consistent policy of “encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid.” *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002), *quoting Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

*Old Ben Coal*, 18 S.R.R. at 1092 (*quoting* 15A American Jurisprudence, 2d Edition, pp. 777-78 (1976)).

“While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation.” *Id.* However, if “a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval.” *Old Ben Coal*, 18 S.R.R. at 1093. “[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement.” *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

“Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation.” *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties are both represented by counsel. The parties have expended significant time and resources in discovery and motion practice, exchanged thousands of pages of discovery, and conducted twenty-five fact and nine expert depositions. Joint Response at 14. The Settlement Agreement was negotiated over a period of time and with the assistance of a federal magistrate judge. Joint Response at 6. The parties have independently, with the advice of counsel, determined that resolution of this proceeding is in their best interest. Joint Response at 14. The Settlement Agreement has been approved by the Board of Port Commissioners and by the federal court in the related litigation. Joint Response at 6, 9.

Based on the representations in the Joint Response, the Settlement Agreement, and other documents filed in this matter, the agreement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Accordingly, the Settlement Agreement is hereby approved.

A handwritten signature in cursive script, reading "Erin M. Wirth", is written over a horizontal line.

Erin M. Wirth  
Administrative Law Judge